

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 92-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	
_____)	

**COMMENTS TO NOTICE OF
PROPOSED RULEMAKING**

Gulf Coast Broadcasting, Inc. ("Gulf Coast"), by its attorneys, hereby submits its
Comments to the Federal Communications Commission's ("FCC" or "Commission") Notice of
Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.¹

¹ FCC 97-397 (released November 26, 1997)

INTRODUCTION

Gulf Coast is the licensee of full-power station KRIS-TV channel 6, Corpus Christi, Texas. Gulf Coast, through its affiliate, Miramar Broadcasting Company, L.C., also has an interest in several LPTV stations in the Corpus Christi, Texas, area operating on channel 47.

Channel 38 is currently allocated for analog television in the Corpus Christi community. Eight parties have tendered applications for full-power stations on channel 38 in Corpus Christi.² All of these applications were tendered on or before September 20, 1996. However, all of these applications are also subject to the FCC's 1987 freeze on the acceptance of applications for vacant television allotments in the top 30 markets.³ For this reason, the FCC has not established a file number for any of the applications, placed any of the applications on public notice, or established a cut-off date for the filing of mutually exclusive applications or petitions to deny as required by FCC Rule 73.3572(d). In fact, according to the *Freeze Order*, the Commission was to return the applications along with any applicable filing fees.⁴

² These parties are: Minority Media TV 38, LLC; Patricia Card Smith; Davis Television Corpus Christi; Humberto Lopez; Marri Broadcasting, LP; Paloma Broadcasting Company, Inc.; Prime Broadcasting Company; and Sunbelt Broadcasting Company.

³ See *Advanced Television Systems and Their Impact on Existing Television Service*, Order, 76 Rad. Reg. 2d (P&F), 843 (1987) ("*Freeze Order*"). This Order placed a freeze on the acceptance of construction permit applications for vacant television allotments in the top 30 markets so as to preserve sufficient broadcast spectrum to implement digital television.

⁴ *Freeze Order* at ¶ 3

On August 5, 1997, President Clinton signed the Balanced Budget Act of 1997⁵ which, among other things, expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act to include mutually exclusive initial license applications for certain types of broadcast stations. The Budget Act also added a new Section 309(l) to deal with the resolution of pending comparative broadcast initial licensing cases.⁶

In the past, the Commission used comparative hearings to decide among mutually exclusive applications for new full service commercial broadcast stations. However, recent appeals court decisions held that the Commission's criteria for distinguishing between mutually exclusive applications were arbitrary and capricious. Accordingly, since 1994, the Commission has stayed all comparative cases relating to commercial broadcast station applications pending resolution of the issues raised by the appeals cases. Section 309(l) was intended to facilitate the Commission's disposition of this backlog of comparative hearing cases.

Gulf Coast urges the Commission to find that the applications that were tendered to the Commission for new construction permits for channel 38 Corpus Christi are not subject to

⁵ Pub. L. No. 55-33, 111 Stat. 251 (1997).

⁶ Specifically, with respect to pending, mutually-exclusive applications filed with the commission before July 1, 1997, Section 309(l) provides: (1) that the Commission has the authority to conduct a competitive bidding proceeding to award such licenses; (2) that the Commission must treat persons filing such applications as the only persons eligible to be qualified bidders; and (3) that, for a period of 180 days beginning on the date of the enactment of the Budget Act, the Commission must waive any provisions of its regulations necessary to permit such persons to enter into an agreement to procure the removal of a conflict between their applications.

the provisions of new Section 309(l). Corpus Christi channel 38 is subject to the Commission's *Freeze Order*. For this reason, the Commission has never accepted the applications at issue for filing and has instead treated them as requests for waiver of the freeze. Because there are no pending applications for channel 38 Corpus Christi that were accepted for filing by the Commission prior to July, 1, 1997, Section 309(l) does not apply.

Gulf Coast also urges the Commission to clarify that the Commission will not auction a license for an analog TV station on channel 38 Corpus Christi unless the Commission has either granted a waiver request or lifted the *Freeze Order* and has opened a window for the filing of competing mutually exclusive applications. Such a clarification is supported by the Commission's rationale for imposing the freeze, to preserve spectrum resources for the conversion to digital television ("DTV"), and Congress' intent in enacting amended Section 309(j) and new Section 309(l) of the Communications Act.

DISCUSSION

In the *NPRM*, the Commission tentatively proposes to use auctions to resolve pending broadcast initial licensing proceedings that are within the scope of Section 309(l).⁷ If the Commission uses auctions, new Section 309(l) requires the Commission to treat persons who filed competing mutually exclusive applications before July 1, 1997, as the only persons eligible to be qualified bidders. Section 309(l) also provides that for a period of 180 days following enactment of the Budget Act, the Commission must waive any provisions of its

⁷ *NPRM* at ¶ 14.

regulations necessary to permit applicants who filed their applications before July 1, 1997, to enter into an agreement to remove conflicts between their applications. The Commission tentatively concludes that these provisions of Section 309(l) apply in all cases when two or more mutually exclusive applications were filed before July 1, 1997.⁸

On July 17, 1987, the FCC announced that it would no longer accept applications for analog television stations in the nation's 30 largest television markets.⁹ The purpose of the *Freeze Order* was "to preserve sufficient broadcast spectrum to insure reasonable options relating to spectrum issues" for the implementation of digital television technologies.¹⁰ To this end, the Commission temporarily froze the table of allotments in the top 30 markets and announced that it would not accept applications for construction permits for vacant television allotments in areas subject to the freeze. Specifically the Commission stated:

[T]he Commission *will not accept* amendments to the TV Table of Allotments or applications for television construction permits for vacant television allotments within [freeze areas]. Any television application received by the Commission that is not acceptable due to this freeze will be returned, along with any accompanying filing fee, to the applicant.¹¹

⁸ *NPRM* at ¶ 25.

⁹ *Freeze Order* at ¶ 3.

¹⁰ *Id.* at ¶ 2.

¹¹ *Id.* at ¶ 3. (emphasis original)

The Commission also noted that it would consider waiver requests on a case-by-case basis for applicants that could show compelling reasons why the freeze should not apply to their particular situation.¹²

In spite of the Commission's *Freeze Order*, some parties have tendered applications for vacant allocations in freeze areas. Such is the case for channel 38 in Corpus Christi. Although more than two parties tendered applications to the Commission for channel 38 Corpus Christi before July 1, 1997, the Commission did not accept any of the applications for filing because they were subject the Commission's *Freeze Order*; they were not put on public notice and the Commission has not opened a window for the filing of mutually exclusive applications or petitions to deny.

Because no competing mutually exclusive applications for channel 38 Corpus Christi were accepted for filing before July 1, 1997, Section 309(l) does not apply. Section 309(l) was intended to direct the Commission regarding the disposition of pending, mutually exclusive applications accepted for filing before July 1, 1997, and for which the Commission has opened a window for the filing of mutually exclusive applications. Section 309(l) was not intended to apply to situations when the Commission has not accepted even a single application for filing or opened a window for the filing of competing applications. Such is the case when an application, or even multiple applications, has been tendered to the Commission but not accepted for filing because of the *Freeze Order*.

¹² *Id.* at ¶ 2.

This interpretation of Section 309(l) is congruent with the legislative history concerning that section.¹³ In the Conference Report, Congress noted that Section 309(l) was intended to apply to pending comparative licensing cases when the Commission was required to select between competing mutually exclusive applications:

The conferees adopted a new provision with respect to the applicability of competitive bidding to *pending comparative licensing cases*. New [S]ection 309(l) of the Communications Act requires the Commission to use competitive bidding to resolve any *mutually exclusive broadcast applications* for radio or television broadcast licenses that were filed with the Commission prior to July 1, 1997.¹⁴

Section 309(l) was not intended to apply to situations when the Commission has not accepted any applications for filing, as is the case when applications are subject to the *Freeze Order* or when the Commission has not opened a window for the filing of competing applications.

The conferees recognize that there are instances where a single application for a radio or television broadcast license has been filed with the Commission, but that no competing applications have been filed because the Commission has yet to open a filing window. In these instances, the conferees expect that, regardless of whether the application was filed before, on or after July 1, 1997, the Commission will provide an opportunity for competing applications to be filed consistent with the Commission's procedures. Furthermore, if and when competing applications are filed, the Commission shall assign such licenses using the

¹³ H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 573 (1997) ("Conference Report").

¹⁴ *Id.* at 573. (emphasis added)

competitive bidding procedures developed under [S]ection 309(j) as amended.¹⁵

In the instant case, no applications at all have been accepted for filing with the Commission for channel 38 Corpus Christi and no window has been opened for the filing of competing applications has been opened. Accordingly, Section 309(l) does not apply.

Moreover, the Commission should not auction an analog TV license for channel 38 Corpus Christi as that allotment should be deleted pursuant to the Commission's *6th Report and Order* in the DTV proceeding.¹⁶ In that decision, the Commission determined that vacant analog TV allotments would be deleted where the allotments are not the subject of pending applications to facilitate the migration to digital television:

[E]liminating existing vacant NTSC [analog TV] allotments will help us better achieve our goals of full accommodation, service area replication and spectrum recovery in the development of DTV allotments. If vacant allotments were retained, it would not be possible to accommodate all existing broadcasters in some areas and the expected service areas of many of the DTV allotments would be reduced. . . . Moreover, we believe that new television broadcast stations should operate with the new DTV technology. In this regard, licensing of new NTSC stations will come to an end . . . [and] there is no need to maintain vacant NTSC allotments that are not the subject of a pending application or rule making proceeding.¹⁷

¹⁵ *Id.* at 574.

¹⁶ *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 14558, 14639 (1997).

¹⁷ *Id.*

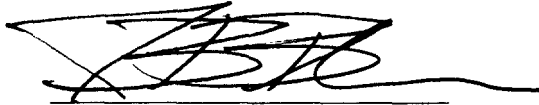
The Commission did state that it would preserve vacant analog TV allotments when such allotments were subject to pending applications or petitions.¹⁸ However, the Commission did not extend this protection to cases when requests for waiver of the *Freeze Order* were pending with respect to vacant analog allotments. Extending such protection to waiver requests would undermine the very purpose of the *Freeze Order*, which was to preserve spectrum for the conversion to digital television.

Notwithstanding the above, if the Commission decides that channel 38 Corpus Christi should in the future be auctioned the Commission must first lift or grant a waiver of the *Freeze Order*, and then open a window for the filing of competing applications from anyone. If competing applications are filed, the Commission must auction the license pursuant to Section 309(j) as amended. This interpretation of the statutes at issue is consistent

¹⁸ *Id.*

with the Commission's recent decision in the Channel 60-69 Reallocation Order in which the Commission held that the *Freeze Order* would continue to apply to applications/waiver requests that might be amended to seek a channel below channel 60.¹⁹

Respectfully submitted,

A handwritten signature in black ink, appearing to be "J. Breck Blalock", written over a horizontal line.

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February 26, 1998

¹⁹ *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, Report and Order, ET Docket No. 97-157, FCC 97-421 (released January 6, 1998).

CERTIFICATE OF SERVICE

I, Susanne M. Gyldenvand, do hereby certify that a copy of the foregoing Comments to Notice of Proposed Rulemaking for Gulf Coast Broadcasting, Inc. was served by hand-delivery (where indicated by an "*"), or by first-class United States mail, postage prepaid, this 26th day of January, 1998, to the following:

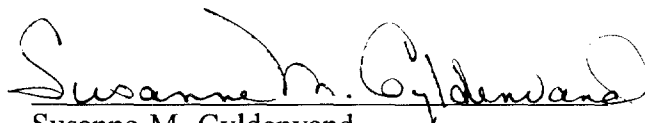
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